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No. 10-1491

In The Supreme Court of The United States

ESTHER KIOBEL, *ET AL.*, *Petitioners,*

v.

ROYAL DUTCH PETROLEUM CO., *ET AL.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* ENGLISH LAW PRACTITIONERS MARTYN DAY, RICHARD HERMER QC, RICHARD MEERAN, AND BLINNE NÍ GHRÁLAIGH IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are English law practitioners specializing in international human rights litigation. Together, they have acted in almost all of the recent extraterritorial tort cases before English courts referred to in this brief.

Richard Hermer QC practices at Matrix Chambers, London. He has appeared as counsel in many of the cases referred to herein including *Al Jedda*, *Al Skeini*, *Motto*, *Guerrero*, and *Al Rawi*. Martyn Day and Richard Meeran are partners at Leigh Day & Co., a firm of London solicitors widely recognized as the leading specialists in international human rights tort litigation in the United Kingdom. They have brought numerous cases (including many cited herein) before English Courts for damages

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[1] Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, all parties have consented to the filing of this brief. Letters providing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici* certify that no counsel for any party authored this brief in whole or in part, and neither counsel for any party nor any party itself provided a monetary contribution to support preparation of this brief. Further, no person or entity provided monetary contributions in support of this brief.

Amici substantially authored this brief, with the guidance and aid of counsel, and the tireless assistance of Ms. Elizabeth Prochaska and Professor Aileen McColgan, all of counsel practicing at Matrix Chambers, London, and Dr. Jodie Kirshner, a fellow of Peterhouse College, University of Cambridge.

arising out of human rights violations committed overseas. Blinne Ní Ghrálaigh is a barrister at Matrix Chambers, London, specializing in cases involving allegations of extraterritorial human rights abuses. She is an executive committee member of the Bar Human Rights Committee (the international human rights arm of the Bar of England and Wales). The first three *Amici* are presently instructed in a claim before the English High Court against Shell Nigeria for environmental damage in the Niger Delta. *See Bodo Cmty. v. Shell Petroleum Co. of Nigeria*, Claim No. HQ 11X01280, High Court (QB) (Eng.) (filed Apr. 6, 2011).

Amici wish to ensure that the Court is informed that, contrary to the suggestion of the Brief *Amici Curiae* submitted by the Governments of the United Kingdom and the Netherlands, [2] under English common law and the Brussels Regime, there is nothing extraordinary or extravagant in the extraterritorial scope of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Nor does extraterritorial application violate any norms of international law. In fact, English courts may assume jurisdiction over international law violations committed overseas in circumstances that mirror the assumption of jurisdiction of U.S. courts in ATS cases.

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[2] *See generally* Brief of the Gov'ts of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of The Netherlands as *Amici Curiae* in Support of the Respondents ("U.K. and Netherlands Brief"), *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (filed Feb. 3, 2012), 2012 WL 405480.

SUMMARY OF THE ARGUMENT

At the conclusion of oral argument in this matter, Chief Justice Roberts asked whether the extra-territorial jurisdictional reach of the ATS was unique or whether similar provisions existed in other legal systems.[3] *Amici* here demonstrate that there is nothing unique about the ambit of the ATS. The law of England and Wales[4] permits tort claims similar to *Kiobel* to proceed in its jurisdiction, often as of right. Although there are some differences between the ATS regime and the English equivalent (in particular, the latter is based in common law and is not restricted to actions for breaches of the law of nations), both jurisdictions permit similar types of extraterritorial claims.

English common law rules on jurisdiction, taken with European Community law, mean that English courts can, and will, accept jurisdiction in tort cases where the victim is domiciled in a foreign country and where the relevant acts were committed or damage was sustained in a foreign country. In cases in which a defendant is domiciled in England, jurisdiction is established as of right irrespective of the locus of the act or where damage was sustained.

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[3] *See* Tr. of Oral Argument at 54-55, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (argued Feb. 28, 2012).

[4] Hereinafter, references to the law and jurisdiction of England are to be read as referring to the law and jurisdiction of England and Wales. The brief does not discuss the law of Scotland or Northern Ireland, which have separate legal systems.

In cases where a non-European domiciled defendant is served with a Claim Form in England, jurisdiction is established subject only to *forum non conveniens* considerations. Even where a foreign defendant is not, nor has ever been, present in England, the Court may nevertheless accept jurisdiction subject to *forum non conveniens* considerations and rules of procedure determining service of claim forms out of the jurisdiction.

Accordingly, in recent years English courts have heard claims arising from human rights violations occurring in countries such as Peru, Kenya and Iraq, for mass environmental damage in the Ivory Coast and Colombia, and for industrial disease exposure in South Africa and Namibia. The U.K. Government's suggestion, in its Brief *Amici Curiae* in this matter, that the jurisdictional reach of the ATS is inconsistent with international law norms is not reflected in the law or practice of its own legal system.

ARGUMENT

I. IN ENGLAND, CIVIL CLAIMS FOR VIOLATIONS OF INTERNATIONAL LAW OCCURRING ABROAD ARE ACTIONABLE UNDER THE COMMON LAW, AND, IF THEY CONCERN A PUBLIC BODY, UNDER THE HUMAN RIGHTS ACT OF 1998.

The ATS is a uniquely American statute, which has no counterpart in the United Kingdom ("U.K."). Unlike the United States legislature, the U.K. Parliament has not introduced legislation providing

for broad civil liability for violations of the law of nations. That is not to say, however, that English law does not provide for causes of action for acts constituting breaches of the law of nations, wherever they have occurred, or does not allow courts to become seized of such claims. On the contrary, English law provides for multiple bases of jurisdiction for cases alleging breaches of the law of nations including: (a) tort claims under the common law, (b) claims under the Human Rights Act 1998, and (c) statutory criminal laws.

The fact that the breaches in question are not described in a manner identical to the ATS as "violations of the law of nations" is immaterial, and irrelevant to this analysis. Indeed, the U.K. Government noted:

> [I]t is for each individual State to decide whether and how to regulate corporate activity within its territory and/or otherwise subject to its jurisdiction. This can be done under a number of domestic law heads . . . . Thus, it is certainly open to a State to create legal rules that make companies liable to pay . . . compensation for individuals injured by reasonably specified human rights abuses (*whether or not described as such*).

See Brief of the Gov'ts of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents ("U.K. and Netherlands Brief") at 28, *Kiobel v. Royal Dutch Petroleum*, No.

10-1491 (filed Feb. 3, 2012), 2012 WL 405480, at *28 (emphasis added).

A. Claims for violations of the law of nations are actionable in the United Kingdom under common law.

Claims for violations of the law of nations against State and non-State actors are actionable in England under long-standing common law principles. Such claims do not arise under discrete or freestanding violations of the law nations such as "torture" or "prolonged arbitrary detention" in breach of international law. Rather, they are cognizable under centuries-long-established heads of tort, such as battery, trespass to the person, conspiracy to injure, false imprisonment, nuisance and negligence. Examples of such claims over which English courts have asserted jurisdiction include:

- *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) & Others*, [2006] UKHL 26 (Eng.), which involved claims against Saudi Arabia and one State agent, *inter alia*, for assault and battery, trespass to the person and false imprisonment, arising out of the torture by British citizens in Saudi Arabia. The claims were defeated by the doctrine of sovereign immunity, but the court did not challenge the availability of a remedy in tort for trespass to the person.

- *Guerrero v. Monterrico Metals*, [2009] EWHC (QB) 2475 (Eng.), which involved a claim against the parent company of a Peruvian mine brought, *inter alia*, for trespass to the person, conspiracy to cause injury, and negligence (and their equivalents under the Peruvian Civil Code) arising out of the detention and torture of the Peruvian claimants protesting the mine, and alleged that the parent incited and aided the commission of violations by the Peruvian police.

- *Mutua & Others v. Foreign & Commonwealth Office*, [2011] EWHC (QB) 1913 (Eng.), which involved a claim for trespass to the person, vicarious liability, and negligence arising out of allegations of systemic torture by the British colonial regime in Kenya during the 1950s.

- *Al Rawi & Others v. Security Services and Others*, [2011] UKSC 34 (Eng.), which involved a common law tort claim brought by former and current Guantanamo detainees for trespass to the person, conspiracy to injure, misfeasance in public office and negligence against the British Security Services for its complicity in the unlawful ill treatment of detainees at various locations.

- *Iraqi Civilian Litigation Against the Ministry of Defence*, Claim No. HQ09X01235, High Court (QB) (Eng.) (filed Mar. 24, 2009), a class

> action currently proceeding before the English High Court of Justice brought by over 200 Iraqi civilians for damages premised upon their alleged torture, mistreatment and false imprisonment by British forces, constituting trespass to the person, misfeasance in public office, and negligence.

Whether or not the tort in question involved a grave violation of international human rights law has no bearing on the head of claim pleaded before English courts. However, it may lead to the award of aggravated damages for conduct involving malevolence or spite by the defendant, or injury to the claimant's feelings. *See Horsford v. Bird,* [2006] UKPC 3, 14 (Eng.) (damages awarded for "high-handed, insulting or oppressive conduct").

As the above examples demonstrate, civil claims in England for violations of international law may be premised on the negligent failure to prevent human rights abuses, as well as on intentional acts, such as trespass or conspiracy to injure. *See, e.g., Mutua,* [2011] EWHC (QB) 1913 (involving a claim based on, *inter alia,* negligence of the U.K. Government, as the former colonial power, for failing to prevent abuses). Furthermore, claims lie under English common law not only against primary tortfeasors, but also against those deemed to have "aided, counseled, directed or joined" tortious actions. *See Petrie & Lamont* (1841), Car. & M. 93, 174, Eng. Rep. 424,

426 (Tindal C.J.);[5] *see also Guerrero v. Monterrico Metals*, [2009] EWHC (QB) 2475 (Eng.).

B. The Human Rights Act of 1998 allows English courts to recognize a cause of action against State and public bodies for breaches of the European Convention of Human Rights, including violations of the law of nations occurring abroad.

The only U.K. statute that makes specific provision for breaches of international human rights norms is the Human Rights Act 1998 ("HRA"). Pursuant to section 7 of the HRA, English courts may recognize causes of action against State actors and public authorities[6] for those violations of the law of nations which constitute violations of the European Convention on Human Rights ("ECHR"). Such violations include torture and prolonged arbitrary detention. *See, e.g., R. v. Sec'y of State for Defence, ex parte Al-Jedda*, [2007] UKHL 58 (Eng.) (involving a claim against the U.K. for prolonged internment of a joint British/Iraqi national in a detention facility in Iraq without trial, in breach of

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[5] *See also* Clerk & Lindsell on Torts, ch. 4-04 (20th ed. 2010). *See generally Mutua*, [2011] EWHC (QB) 1913 (refusing to strike as unactionable a claim of joint liability against the British Government for acting in "common design" with the Kenyan Colonial Administration to commit trespass to the person).

[6] "State actors" and "public authorities" are defined as "any person certain of whose functions are functions of a public nature," though excluding private acts. Human Rights Act, 1998, c. 42, §6(3)(b) (Eng.).

art. 5(1) ECHR, guaranteeing the right to liberty);[7] *R. (Ali Zaki Mousa) v. Sec'y of State for Defence*, [2011] EWCA (Civ) 1334 (Eng.); *R. (Al-Sweady and Others) v. Sec'y of State for Defence*, [2009] EWHC (Admin) 1687 (Eng.) (involving claims against the U.K. for indefinite detention and mistreatment of Iraqi civilians by U.K. forces in Iraq).

Such claims under the HRA arise in addition to, not in substitution for, long-established heads of claim under the common law.[8] Consequently, many claims before English courts alleging breaches of the HRA will also include heads of claim for breach of domestic tort law.

C. Violations of the law of nations occurring outside of the United Kingdom are also criminalized under United Kingdom legislation.

Civil claims are by no means the only manner in which English courts assume jurisdiction over violations of the law of nations occurring in the territory of another sovereign. Importantly, in England, civil liability for violations of the law of nations committed overseas co-exists alongside *criminal* liability for such violations. The British legislature has introduced a number of statutory

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[7] The U.K. was found in breach of its obligations arising under art. 5(1) by the European Court of Human Rights on appeal from the House of Lords. *See Al Jedda v. United Kingdom*, [2011] ECHR 1092.

[8] *See* Human Rights Act, 1998, c. 42, §11.

provisions providing for the criminalization of violations of the law of nations. Thus, English law permits courts to assert extraterritorial jurisdiction over grave violations of international law committed in the territory of other sovereign nations.[9] Such provisions include:

- The Slave Trade Act, 1843, c. 98, §1 (criminalizing participation in the slave trade by "British subjects . . . whether within the dominions of the British crown or of any foreign country");

- The Geneva Conventions Act, 1957, c. 52, §1(1) and Geneva Conventions (Amendment) Act, 1995, c. 27, §1 (allowing for prosecutions for war crimes constituting grave breaches of one of the four Geneva Conventions of 1949 or their first additional Protocol, committed by "any person,

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[9] U.K. legislation also provides for extraterritorial jurisdiction over various other international crimes, not constituting violations of the laws of nations, committed in the sovereign territory of other nations, including: hostage taking by "a person, whatever his nationality . . . in the United Kingdom or elsewhere." *See* Taking of Hostages Act, 1982, c. 28, §1; *see also* United Nations Personnel Act, 1997, c. 13, §§ 1-5 (offences against United Nations personnel by "a person . . . outside the United Kingdom"); Terrorism Act, 2000, c. 11, § 1(4) (terrorism, including criminal acts related to terrorism committed "outside the United Kingdom"); Bribery Act, 2010, c. 23, §3(6) ("function or activity is a relevant function or activity even if it . . . is performed in a country or territory outside the United Kingdom").

whatever their nationality . . . whether in or outside the United Kingdom");

- The Criminal Justice Act, 1988, c. 33, §134(1), (2) (providing for jurisdiction over torture "by a person . . . whatever his nationality . . . in the United Kingdom or elsewhere");[10]

- The War Crimes Act, 1991, c. 13, §1 (criminalizing certain "violation[s] of the laws and customs of war" committed by a "British citizen or resident" in the sovereign territory of Germany during World War II); and

- The International Criminal Court Act, 2001, c. 17, §51(1) (criminalizing genocide, crimes against humanity, and war crimes committed "outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to U.K. service jurisdiction").

Pursuant to such legislation, English courts can, and do, assert jurisdiction over "foreign cubed" cases—those involving crimes against the law of nations committed in a foreign jurisdiction, against a foreign victim, by a foreign national. Consider, for example, the prosecution and conviction in 2003 of Afghan warlord, Sarwar Zardad, for conspiracy to commit torture against Afghanis in Afghanistan. *See generally R. v. Zardad,* [2007] EWCA (Crim) 279 (Eng.).

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[10] Torture is also criminalized under the International Criminal Court Act, 2001, c. 17.

Criminal liability attaches to both natural and legal persons, including companies, unincorporated persons, and partnerships.[11] As a general rule, a company will have imputed to it the acts and state of mind of its directors and managers who represent its "directing mind and will" for the purposes of criminal liability.[12] Furthermore, both natural and legal persons may be held criminally liable under theories of both principal and secondary liability, including as aiders and abettors. *See, e.g.*, Int'l Criminal Court Act, 2001, c. 17, §52 (making it "an offence against the law of England and Wales for a person to engage in conduct ancillary to an act"); *see also id.* at §55(1) (providing that ancillary acts including "aiding abetting, counseling or procuring the commission of an offence" are illegal). Under English law, the *mens rea* standard for aiding and abetting liability, including aiding and abetting international crimes, is knowledge. *See, e.g.*, The Int'l Crim. Court Act, c. 17, Explanatory Notes ¶ 101 (providing that all "reference to aiding, abetting, counseling or procuring is to conduct that . . . would be punishable under section 8 of the Accessories and Abettors Act 1861," and establishing knowledge as the mental element for secondary liability).

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[11] The word "person" under the Criminal Justice Act 1988, the Geneva Conventions Act 1957, and the International Criminal Court Act 2001, refers to a "body of persons corporate or unincorporated." Interpretation Act, 1978, c. 30, sched. 1.

[12] *See Lennard's Carrying Co. v. Asiatic Petroleum Co.*, (1915) AC 705, 713.

II. DOMESTIC STATUTORY AND COMMON LAW RULES ALLOW ENGLISH COURTS TO ASSUME JURISDICTION OVER CLAIMS INVOLVING ACTS COMMITTED ABROAD UNDER MULTIPLE CIRCUMSTANCES.

Whether such torts constitute violations of the law of nations is largely irrelevant to the application of English domestic statutory and common law rules. The central question in determining whether and on what basis English courts may assert jurisdiction over causes of action alleging illegal activity committed abroad is not whether the activity constitutes a violation of the law of nations, but *where the defendant is domiciled.* This is primarily regulated by Brussels I Regulation ("Brussels Regulation")[13] as enacted into English law by the Civil Jurisdiction and Judgments Order 2001,[14] amending the Civil Jurisdiction and Judgments Act 1982 ("CJJA"). This regulates the choice of forum in tort claims where the Defendant is domiciled within the European Union ("E.U.") regardless of where the alleged tortious action took place, and whether it constituted a violation of the law of nations. If the

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[13] Council Regulation 44/2001, 2000 O.J. (L 012) 1 (EC), was derived from the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968. 1978 O.J. (L 304) 77, *amended by* 1990 O.J. (L 189) 2.

[14] Civil Jurisdiction and Judgments Order, 2001, S.I. 2001/3929 (U.K.). A modified version of the Brussels regime applies in relation to intra-United Kingdom cases. *See* Civil Jurisdiction and Judgments Act, 1982, c. 27, sched. 4.

defendant is domiciled outside the E.U., the jurisdiction of English courts over acts occurring outside U.K. territory is governed by the English common law, as codified in the Civil Procedure Rules ("CPR"),[15] Part 6, and associated Practice Direction ("the common law regime"). Such assumption of jurisdiction by English courts is subject to fundamental principles of international law, including sovereign immunity.

Although the U.K. Government noted in its brief that the primary bases for jurisdiction arising under international law for civil claims, as recognized by U.S. courts, are "the territorial principle" and "the nationality principle," alongside the "sometimes controversial effects doctrine,"[16] it failed to make clear that such jurisdictional principles *are not* the primary bases on which its own courts assert jurisdiction in civil claims. Indeed, whether the tortious act or omission in question took place in the U.K. or abroad, and whether the defendant is a U.K. national or not, are *irrelevant* to the exercise of general jurisdiction under the Brussels regime: the primary basis for jurisdiction is where the defendant is *domiciled*. The only exception to this rule is provided by Article 5(3), which deems that, in a tort/delict claim, a Defendant domiciled in a Member State may be sued in a different Member State if the "harmful event" occurred there; the matter is for the

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[15] Civil Procedure Rules, 1998, S.I. 1998/3132 (U.K.).

[16] U.K and Netherlands Brief at 29-30, *Kiobel*, No. 10-1491.

plaintiff's election. Importantly, an English court taking territorial or nationality questions into consideration would be acting *in breach* of the U.K.'s international obligations. Under the common law regime (*i.e.*, where the defendant is not domiciled in the E.U.), matters of territory and nationality are relevant *only* to the application of *forum non conveniens;* jurisdiction is not premised on the territorial or nationality principle, but on *service* of proceedings, whether inside or outside U.K. territory. As such, the U.K.'s own domestic laws do not comply with the jurisdictional rules the U.K. Government exhorts this Court to adopt for the ATS.

Neither does the "presumption against exercise of extraterritorial jurisdiction" in relation "to common law claims for the modest number of international law violations with a potential for personal liability"—which the U.K. urges this court to adopt as a general presumption in relation to common law claims[17]—operate in the U.K.'s own courts, or bind its own judges. Indeed, English courts applying such a presumption in Brussels regime cases would be acting in violation of the U.K.'s international commitments. Rather than imposing a presumption against the exercise of extraterritorial jurisdiction, the Brussels and common law regimes in fact provide for *multiple*, often overlapping, bases on which English courts may and do assume extraterritorial jurisdiction over causes of action

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[17] U.K and Netherlands Brief, at 29-30, *Kiobel*, No. 10-1491 (internal quotation marks omitted).

involving violations committed abroad. It is largely irrelevant to the operation of those rules whether or not the tortious activity committed abroad is capable of constituting one of "the modest number of international law violations with a potential for personal liability."[18] The same rules apply to even less serious torts. The primary exception relates to claims alleging violations of the Human Rights Act 1998, to which particular rules on extraterritoriality apply.

A. Pursuant to the Brussels regime, the primary basis for jurisdiction is domicile, regardless of where the tortious acts took place, and such jurisdiction arises as of right.

Pursuant to the Brussels regime, if a defendant to a tort claim is domiciled in the England, English courts will have jurisdiction over such claim as of right, regardless of where the tort took place or the nationality of the defendant or claimant ("general jurisdiction").[19]

Individuals are domiciled in England if they are residents of England, and the nature and circumstances of that residence indicate a substantial connection with England. Consequently, English courts have jurisdiction over so-called

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[18] *Id.*

[19] CJJA, c. 27, sched. I, tit. II, art. 2 ("persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State").

"foreign cubed" cases—those involving tortious acts in a foreign jurisdiction, against a foreign claimant, by a foreign defendant—provided such defendant is domiciled in England. As such, English courts would be able to assume *prima facie* jurisdiction over a defendant such as "Peña-Irala",[20] domiciled in the England, for trespass to the person, including torture, inflicted against a foreign claimant abroad. Such assumption of jurisdiction arises *pursuant to* the U.K.'s international obligations, not in breach thereof.

A company or other legal person is deemed domiciled where it has its statutory seat, its central administration, or its place of business or association.[21] Thus, in theory, a legal body could be domiciled in up to three separate countries. Under Article 2 of the Brussels Regulations, the English courts have jurisdiction as of right over a cause of action against a company domiciled in England, regardless of where the tortious acts giving rise to the claim took place or the claimant's nationality.

Foreign tort cases in the English courts alleging acts constituting breaches of human rights occurring abroad often involve questions of parent-subsidiary liability. Thus, English courts have entertained a

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[20] *See Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

[21] Brussels Regulation 44/2001, 2000 O.J. (L 012) 1 (EC) art. 60(1); *see also King v. Crown Energy Trading AG*, [2003] EWHC (Comm) 163 (Eng.), [2003] I.L.Pr. 28 (on the meaning of "principal place of business").

number of negligence cases directly against a parent domiciled in England, with jurisdiction as of right, for the parent's failure to prevent human rights abuses occurring at the overseas operations of a foreign-subsidiary it effectively controlled.[22] This has materially enlarged the jurisdiction of English Courts as of right in cases in which plaintiffs sustained injuries in a foreign country due to the acts and omissions of the controlling parent company domiciled in England.

Examples of such cases over which English courts have assumed jurisdiction as of right, in compliance with its obligations under international law, include:

- *Guerrero v. Monterrico Metals*, [2009] EWHC (QB) 2475, at 23-24 (Eng.) (involving a claim against Monterrico, a U.K.-registered parent domiciled in the U.K. pursuant to Brussels Regulation, art. 60, for its acts and omissions relating to operations of its indirectly wholly owned Peruvian subsidiary alleged to have been complicit with Peruvian security forces);

- *Lubbe v. Cape Plc*, [1998] EWCA (Civ) 1351[23] (group claim brought by South African miners against U.K.-domiciled Cape Plc for the alleged

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[22] A separate and distinct duty of parent companies to victims has been held not to challenge notions of the corporate veil because the obligation is free-standing. *See Chandler v. Cape Plc*, [2012] EWCA (Civ) 525.

[23] *See also Lubbe and Others and Cape Plc and Related Appeals*, [2000] UKHL 41.

negligent advice and control by the former South African subsidiaries' asbestos mining operations); *see also Vava & Others v. Anglo American South Africa*, Claim No. HQ11X03245, High Court (QB) (Eng.) (filed Sept. 1, 2011) (involving a claim by South African miners against Anglo American for the alleged negligent control of the parent company over its South African mining operations); and

- *Ngcobo v. Thor Chemicals Holdings Ltd & Desmond Cowley*, The Times, Nov. 10, 1995, and *Sithole & Ors v. Thor Chemicals Holdings Ltd. & Anor*, [1999] EWCA (Civ) 706 (involving two separate claims brought by South African workers for their exposure to mercury at a U.K.-domiciled parent company's South African subsidiary factory).[24]

In addition to permitting English courts to assume jurisdiction over a company domiciled in England for violations committed by a subsidiary abroad, the Brussels regime also grants English courts jurisdiction over the "branch, agency or other establishment" of a company domiciled in another Member State "as regards a dispute arising out of the operations of [such] branch, agency or other establishment . . . situated [in England]." *See*

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[24] *Lubbe* and *Ngcobo* were decided on *forum non conveniens* grounds without reference to the Brussels Convention, art. 2. In light of *Owusu v. Jackson and Others*, [2005] ECR I-1383, it is plain that Article 2 applies in such cases to secure jurisdiction as of right.

Brussels Regulation 44/2001, 2000 O.J. (L 012) 1 (EC), art. 5(5).

Pursuant to the Brussels regime, English courts *may not* decline to hear cases on the basis of the territorial or nationality principles. Contrary to the suggestion made by the U.K./Netherland brief,[25] an English court adopting such principles, or adopting a presumption against jurisdiction over Brussels regime claims concerning tortious acts occurring extraterritorially, would be acting in breach of its international obligations. Further, and importantly, English courts are precluded from applying the common law doctrine of *forum non conveniens* to such claims. Indeed, within the framework of the Brussels Regime, an English court may not "declin[e] the jurisdiction conferred on it by Article 2 of th[e Brussels] convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action." *See Owusu v. Jackson and Others,* [2005] ECR I-1383, ¶ 46. Provided that at least one defendant is domiciled in England, domestic courts may not stay proceedings on the basis of *forum non conveniens* "even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State." *Id.*

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[25] U.K. and Netherlands Brief, at 30, *Kiobel,* No. 10-1491.

B. Under English common law, where service of a defendant has been properly effected, English courts may assume jurisdiction over claims based on acts committed in the territory of foreign sovereigns, including "foreign cubed" claims.

The common law rules on jurisdiction apply to cases involving defendants from non-Brussels regime States. In contrast to the jurisdictional strictures the U.K. Government urges this Court to apply to ATS claims, jurisdiction under the English common law does not depend on whether the tort occurred in U.K. sovereign territory, constituted a violation of the law of nations, was committed by a U.K. national, or resulted in effects felt in the U.K. Instead, the primary basis for jurisdiction is whether *service* was properly effected on the defendant in U.K. territory.

Under the common law, English courts may assume jurisdiction over *natural* persons if a claim form has been properly served on them while in England.[26] Such jurisdiction is extremely broad, in that it allows claimants to bring proceedings in England if the defendant happened to be temporarily present in England when process was served. *See, e.g., Maharanee of Baroda v. Wildenstein,* (1972) 2 Q.B. 283 (jurisdiction existed where the foreign defendant was served while only briefly present in

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[26] *See* Civil Procedure Rules, 1998, S.I. 1998/3132, R. 6.9 for permissible methods of service.

England); *see also Colt Indus. v. Sarlie,* [1966] 1 W.L.R. 440 (C.A.) (jurisdiction existed over a foreign-cubed claim because defendant had been served while present in London for a few days). As such, under this rule also, English courts would be able to assume *prima facie* jurisdiction over a defendant like "Karadzic," [27] temporarily present in England, for trespass to the person inflicted against a foreign claimant abroad.

English courts may also assume jurisdiction over *legal* persons on the basis of service of proceedings in England. *See* Companies Act, 2006, c. 46; *see also* Civil Procedure Rules, S.I. 1998/3132, R. 6.3-4. Pursuant to those provisions, a foreign company that is not domiciled in England, but which has a place of business in the jurisdiction, may be sued in English courts. There is no requirement that the dispute have any connection with the defendant's activities in England. *See, e.g., Sea Assets v. PT Garuda Indonesia,* (2000) 4 All E.R. 371. Nor is there any requirement that the activity in England constitutes a substantial part of, or is incidental to, the main objects of the foreign company. *See, e.g., South India Shipping Corp. v. Export-Import Bank of Korea,* [1985] 1 W.L.R. 585 (C.A.) (finding a foreign bank had been duly served at a place in England where it did not conduct any banking transactions). Moreover, mere transient occupation for several days by a company at a trade exhibition in England has been deemed sufficient to establish jurisdiction. *See,*

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[27] *See Kadic v. Karadzic,* 70 F.3d 232, 248 (2d Cir. 1995).

e.g., *Dunlop Pneumatic Tyre Co. v. Actien-Gesellshaft*, [1902] 1 K.B. 342.

Whether or not the mere presence of a corporate representative or agent (as compared with an officer or employee of a foreign corporation) in England will be sufficient to establish jurisdiction will depend on the circumstances of the case, and the authority granted to the agent in question. *See* Civil Procedure Rules, 1998, S.I. 1998/3132, R. 6.2(2), 6.5(6) (U.K.); *see also Adams v. Cape Indus. Plc*, [1990] Ch. 433, 523-531 (C.A.). Where the representative or agent has power to contract on behalf of the foreign corporation, there will be little difficulty in establishing jurisdiction. *See, e.g.*, *Saccharin Corp. v. Chemische Fabrik AG*, [1911] 2 K.B. 516 (C.A.). Consequently, English courts are permitted to assume jurisdiction over a foreign corporation for tortious acts constituting violations of the law of nations committed abroad on a number of "exorbitant" bases.

A fundamental difference between the Brussels and common law regimes is that, under the former, assumption of jurisdiction by English courts over tortious acts committed abroad is mandatory. Under the common law regime, however, the assumption of jurisdiction is discretionary, and may be displaced if another court is shown to be a clearly or distinctly more appropriate forum. *See Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, 477; *Lubbe and Others and Cape Plc and Related Appeals*, [2000] UKHL 41, ¶ 17. English courts may decline

jurisdiction on the basis of the principle of *forum non conveniens*, as it applies in the U.K.

It is in relation to the application of the doctrine of *forum non conveniens* that English courts *may* consider such questions as where the tort was committed. *See, e.g.*, *Lubbe*, [2000] UKHL 41. As a general rule, English courts will typically stay proceedings for *forum non conveniens* if the defendant is able to demonstrate that there is another forum with which the party's dispute is more closely connected. Conversely, a stay will be refused if the claimant can satisfy the court either that there is no foreign forum available to the claimant as an alternative forum for resolution of the dispute, or that substantial justice will not be done in the more closely connected forum. In cases alleging extraterritorial tortious activity against non-U.K. nationals, defendants may well be able to establish that a more appropriate forum exists elsewhere.

The modern formulation of the doctrine, as articulated by Lord Goff in *Spiliada Maritime Corp.*, is based on the underlying principle that "a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, that is, in which the case may be tried more suitably for the interests of all the parties and the ends of justice." [1987] A.C. 460; *see also Sim v. Robinow*, [1892] 14 R. 665, 668 (Kinnear L.).

It comprises a two-stage test, based on two distinct considerations. First, courts consider whether the English forum is *more* appropriate than a foreign forum, having regard *inter alia* to the law governing the substance of the dispute, the place of residence or business of the parties, and factors bearing on convenience and expense, including the availability of witnesses. Secondly, if a foreign forum appears *prima facie* to be the more appropriate forum, courts consider whether justice requires that the claimant should not be required to litigate abroad, having regard to all the circumstances of the case. *See generally Lubbe*, [2000] UKHL 41 (Hope L.). In England, "the principles on which the doctrine of *forum non conveniens* rest leave no room for considerations of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice in the case which is before the court." *Id.* ¶ 51. The Court expressly declined to follow the U.S. line of authorities incorporating such considerations into the U.S. formulation of the doctrine. *Id.* ¶ 54.

In claims involving allegations of human rights violations occurring abroad, English courts have repeatedly demonstrated reluctance to stay proceedings, even where England was *not* the most appropriate forum under the first stage of the test. Examples of such cases include:

- *Oppenheimer v. Louis Rosenthal & Co. AG*, [1937] 1 All E.R. 23 (granting leave to serve a writ outside the jurisdiction, though the German court constituted the more appropriate

forum, because the Jewish claimant was unlikely to receive a fair hearing in Nazi Germany and would risk detention in a concentration camp if he initiated proceedings in a German court);

- *Connelly v. RTZ Corp. Plc*, [1998] 1 A.C. 854 (refusing to stay negligence proceedings brought by an England-domiciled former employee of the defendant's wholly owned Namibian subsidiary for harms resulting from his employment in Namibia, because the plaintiff's inability to pay lawyers and experts for a case of such complexity meant that practical access to justice would be denied in Namibia); and

- *Lubbe*, [2000] UKHL 41 (refusing to stay proceedings in an action brought by South African claimants for negligence of the defendant's South African subsidiaries, because plaintiffs would not be able to fund representation and the expert evidence necessary to justly decide the case in South Africa).[28]

An English Court has yet to consider these principles in the context of a claim premised on a

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[28] English courts would no longer apply a *forum non conveniens* analysis in a case such as this involving a U.K.-domiciled company, but would assume jurisdiction as of right. *See generally Owusu*, ECR I-1383.

tort reflecting a breach of the law of nations. But the authorities cited above strongly suggest that such facts would be a powerful factor militating denial of a stay. This would be particularly so where (as may often be the case in claims concerning gross violations of human rights) a fair trial is not possible in the country in which the tort was committed or damage sustained.

C. Under common law, English courts may assume jurisdiction over a cause of action for a tortious act or omission committed in the jurisdiction of another sovereign where the resulting harm occurred in the U.K., even if service cannot be effected within England.

Under part 6 of the Civil Procedure Rules (codifying common law), the Courts can grant a party permission to serve a Claim Form on a person outside the jurisdiction (*i.e.*, who is neither domiciled nor present in England). In addition to the possibility of a stay on the basis of *forum non conveniens*, a Court must be satisfied, of its own motion, that England is a proper place to bring proceedings—that there is a serious issue to be tried with reasonable prospects of success.[29] Additionally, if the claim is brought in tort, damage must have

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[29] *See* Civil Procedure Rules, 1998, S.I. 1998/3132, R. 6.37 (U.K.)

been sustained within the jurisdiction,[30] although English Courts take a liberal approach to this test.

Thus, in the case of *Al-Adsani v. Government of Kuwait,* (1994) 100 I.L.R. 465, the mental health effects that the claimant suffered in England stemming from the physical harm he suffered in Kuwait, constituted damage sustained within the jurisdiction for the purposes of the CPR. *See also Jones v. Saudi Arabia & Others,* [2004] EWCA (Civ) 1394, at 29;[31] *Booth v. Phillips,* [2004] Lloyd's Rep. 457; *Cooley v. Ramsay,* [2008] EWHC 129 (QB); *Harty v. Sabre,* [2011] EWHC 852 (QB). Such "long arm" jurisdiction under the common law is premised on the basis that there are certain situations in which England will be the *forum conveniens*, notwithstanding the fact that jurisdiction cannot be premised on the defendant's presence in England.

D. In cases involving multiple defendants or third parties, English courts may assume jurisdiction over persons domiciled abroad for tortious acts or omissions occurring in the territory of another sovereign where such persons are necessary or proper parties.

Under both the Brussels and common law regimes, additional defendants and third parties non-domiciled or present in England may be joined

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[30] *Id.* at PD 6B, ¶ 3.1.

[31] Although the judgment of the Court was overturned by the House of Lords, this finding was not challenged.

to proceedings brought in English courts against defendants within the courts' jurisdiction. This often arises in cases where foreign subsidiaries of companies domiciled in England are sued for violations committed abroad, alongside the parent company. Under the Brussels regime, in cases involving multiple defendants domiciled in different Member States, each defendant may be sued in the courts of the State in which any one of them is domiciled. Brussels Regulation, 2000 O.J. (L 012) 1, art. 6(1). Consequently, English courts may assume jurisdiction over causes of action involving tortious acts abroad brought by a foreign claimant, against one or more defendants domiciled abroad, provided that at least one defendant is domiciled in England. For example, in *Motto & Ors v. Trafigura,* [2011] EWHC 90206, citizens of the Ivory Coast brought a claim in negligence for damages from exposure to toxic waste dumped in Africa in an English court. The claims were filed against Trafigura Ltd., a U.K.-domiciled company, which had chartered the ship that transported the waste to Africa, and against parent company Trafigura Beheer BV, domiciled in the Netherlands. Further, the claims against different defendants need not be premised on the same legal basis. *See Freeport Plc v. Arnoldsson* Case, [2007] All E.R. (D) 160, [2007] ECR I-8319. Similar rules apply to the joinder of third parties to proceedings, on the defendant's application. Brussels Regulation, 2000 O.J. (L 012) 1, art. 6(2).

Under the common law, English courts may permit process to be served out of the jurisdiction on a second defendant, not domiciled in Europe, in a

claim for tort, where jurisdiction is established over the first defendant under other provisions of the Brussels or common law regimes, and where the second defendant is a necessary or proper party to that claim. *See* Civil Procedure Rules, S.I. 1998/3132, PD 6B, ¶ 3.1(3); *Bodo Cmty.*, Claim No. HQ 11X01280, High Court (QB) (proceedings originally issued against Royal Dutch Shell (domiciled in the U.K.), and its subsidiary, Shell Nigeria (domiciled in Nigeria), although by agreement, the claim ultimately proceeded exclusively in English courts against Shell Nigeria). In such cases, there is typically *no* connection or nexus between the claim and the English forum. Rather, the rationale for assuming jurisdiction is based on the practical consideration that it is more convenient and economical for a dispute involving multiple parties to be litigated in a single forum than to be fragmented among a number of different courts. *See generally Owusu v. Jackson and Others*, [2005] ECR I-1383 (following the judgment of the ECJ precluding a stay of the proceedings against the sole U.K.-domiciled defendant on the basis of *forum non conveniens*, the English court assumed jurisdiction over all defendants in the claim, including five Jamaican defendants, although their conduct had no nexus with the U.K.); *see also Att'y Gen. of Zambia v. Meer Care & Desai*, [2006] 1 CLC 436 (claim against U.K. and Zambia-domiciled defendants in English courts); *Global Multimedia Int'l Ltd. v. Ara Media Servs.*, [2007] I Lloyd's Rep 311; *Barings Plc v. Coopers & Lybrand*, [1997] ILPr 576. Similar rules apply to the joinder of "necessary

or proper" third parties. Civil Procedure Rules, S.I. 1998/3132, PD 6B, ¶ 3.1(4).

Under these common law tests, the Court enjoys a broad discretion in determining whether or not it is appropriate to impose a stay and/or to grant permission to serve outside the jurisdiction. Although not determinative in itself, in the exercise of such discretion, an English Court must consider the U.K.'s obligations under international human rights law, not least the right of victims to an effective remedy.

E. English courts may assume jurisdiction over causes of action premised on conduct in the territory of another sovereign where the defendant submits to jurisdiction, regardless of whether there is *any* nexus to the U.K.

English courts will have jurisdiction over a defendant domiciled in another Brussels regime Member State for acts committed abroad if the defendant submits to such jurisdiction. Brussels Regulation, 2000 O.J. (L 012) 1, art. 23.

Similarly, under the common law regime, a defendant's submission to jurisdiction is sufficient to confer jurisdiction on an English court, regardless of where the tortious acts giving rise to the claim took place. There is no requirement that there be any nexus with the U.K.; as such, the English courts can—and do—assume jurisdiction in "foreign cubed" cases, where the defendant submits to the jurisdiction of the English courts, whether by

agreement or by taking steps to defend the claim on the merits. *See, e.g.*, *Bodo Cmty.*, Claim No. HQ 11X01280, High Court (QB) (company submitted to the jurisdiction of the English courts pursuant to an agreement, whereby claimants agreed to stay proceedings against the U.K.-domiciled parent company).

F. The jurisdiction of English courts over claims alleging breaches of the Human Rights Act by public authorities outside of the U.K. is extremely broad; it may arise over acts committed outside of the U.K., and to acts within the U.K. that expose a person to violations of Convention rights elsewhere.

Recent jurisprudence of the European Court of Human Rights, which is binding on the U.K., establishes an expansive jurisdiction for Member States over acts committed by State or public authority officials abroad. While the primary basis for jurisdiction remains territorial, based on the acts occurring within the territory of a Member State, the Court has recognized a number of exceptions, which provide for jurisdiction of ECHR Member States, including the U.K., far beyond their sovereign territories. Such exceptions include circumstances in which:

- U.K. state agents exercise authority and control abroad. *See, e.g.*, *Al Skeini v. United Kingdom*, [2011] ECHR 95; *Al Jedda v. United Kingdom*, [2011] ECHR 1092 (successful appeal by an

Iraqi national against the U.K. for detention in breach of Article 5(1), on the basis of the U.K.'s effective control over the prison in which he was detained).

- As a consequence of lawful or unlawful military action, the U.K. "exercises effective control of an area outside that national territory." *Al Skeini*, [2011] ECHR 95, § 138.

- Acts of U.K. authorities produce effects outside U.K. territory. *See, e.g.*, *Soering v. United Kingdom*, 11 EHRR 439 (finding that acts by the U.K. giving rise to violations of Convention rights, including the risk of inhuman and degrading treatment and torture, outside U.K. territory, engage the liability of the U.K.); *Othman (Abu Qatada) v. United Kingdom*, [2012] ECHR 56 (Jan. 17, 2012) (Chamber decision) (preventing the U.K. from deporting detainee because there was a real risk that he would be denied the right to a fair trial if deported).

In *all* the above cases, English courts must assume jurisdiction over cases alleging violations of the HRA outside the sovereign territory of the U.K. Assertions that such assumption of jurisdiction over acts occurring in the territory of a sovereign other than the U.K. is in breach of international law have been roundly rejected by the ECHR.

III. JURISDICTIONAL RULES ALLOW ENGLISH COURTS TO ASSUME JURISDICTION OVER CLAIMS OF THE TYPE PURSUED BY PETITIONERS HERE.

The U.K. government seeks to persuade this Court to abrogate for U.S. courts the bases of extraterritorial jurisdiction that its own courts assume for themselves under U.K. statutory and common law. *See* U.K. and Netherlands Brief, at 30. *Kiobel*, No. 10-1491. In fact, English courts would assume jurisdiction over claims such as those pursued by petitioners in this case.

Pursuant to Brussels Regulation, art. 2, Royal Dutch Shell (RDS) is deemed domiciled in both the United Kingdom and the Netherlands. Assuming that the claim had not already been issued in another jurisdiction, plaintiffs in a position comparable to that of Petitioners could establish jurisdiction in English courts against RDS as of right. By operation of Article 2 of the Brussels Regulation, as interpreted by the ECJ in *Owusu v. Jackson*,[32] English courts could not stay proceedings against RDS on the basis of *forum non conveniens*. Further, and alternatively, the plaintiffs could join Shell Nigeria as a necessary party to litigation in English courts against RDS. This is precisely the jurisdictional basis upon which the claims in *Bodo Community*, Claim No. HQ 11X01280, High Court (QB), proceeded, although RDS, pursuant to

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[32] [2005] ECR I-1383.

agreement of the parties, is no longer a party to the case.

The claims, constituting torture and extra-judicial killing, would be pleaded as common law torts of trespass to the person, conspiracy to injure and negligence. Given the nature of the allegations underlying the claim, it would be open to the plaintiffs to seek an award of aggravated or indeed exemplary damages[33] from the court.

If the evidence established that RDS was part of a common design with the Nigerian authorities in relation to which the use of violence against the plaintiffs (or a class to which they belonged) was contemplated, then RDS would be jointly liable for trespass to the person and/or conspiracy to injure. If the evidence demonstrated that RDS, as parent company to Shell Nigeria, knew, or ought to have known, of the risks to the plaintiffs (or a class to which they belonged), a claim in negligence would lie for RDS's failure to take steps to prevent the torture/extra judicial killing.

While *Kiobel* is remarkable for the nature and seriousness of the allegations, the claim itself would be *legally* unremarkable and consistent with well-

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[33] Exemplary damages would not be available against a non-State Actor if the claim were being tried on English law. It is likely however, applying English rules of conflicts of law, that the *lex delecti* would apply and thus, if exemplary damages were available under that regime, an English Court could properly award them.

established rules of jurisdiction, which English courts apply pursuant to U.K. statutory and common law.

Indeed, very many of the cases thus far litigated under the ATS would be deemed actionable before English courts if faced with similar facts. As noted above, if Mr. Pena-Irala had been domiciled in England, a claim for damages could have been brought against him as of right. If he had been served while visiting the country, and it were shown that a fair trial was unlikely in Paraguay, English courts could have accepted jurisdiction if the claimants were latterly resident in England (as would be the case in claims such as those in *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995)). Similarly, if, in *Doe v. UNOCAL Corp.*, 248 F.3d 915 (9th Cir. 2001), UNOCAL was a U.K. domiciled company, a Burmese plaintiff could have brought a claim as of right against UNOCAL for damage sustained in Burma. Additionally, a claim such as that pursued in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), would be equally unremarkable before the English Courts.

In sum, the U.K. Government's intimation that U.S. courts' assumption of jurisdiction over "alleged wrongs [which] occurred entirely within a foreign territory and involved only foreign . . . nationals" would breach "jurisdictional limits imposed by international law,"[34] runs contrary to the broad

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[34] U.K. and Netherlands Brief, at 29-30, *Kiobel*, No. 10-1491.

extraterritorial jurisdiction assumed by English courts in civil cases.

Such an assertion is particularly surprising given the U.K.'s assumption of broad extraterritorial jurisdiction in relation to *criminal* matters. As set out above, the U.K. asserts broad *universal* criminal jurisdiction in "foreign cubed" cases in relation to a number of violations of the law of nations, including torture and grave breaches of the Geneva Conventions, on the simple basis of *presence* of the defendant in the U.K. *See* Criminal Justice Act, c. 33; Geneva Conventions Act, c. 52. The U.K. also exercises such broad jurisdiction in relation to certain crimes which *do not* meet the gravity or wide acceptance threshold so as to constitute violations of the law of the nations, including crimes against United Nations personnel and hostage taking. *See* Taking of Hostages Act, c. 28; United Nations Personnel Act, c. 13. There can be no question that such laws comply with international rules on jurisdiction, and that the U.K. believes them to so comply.

Moreover, the U.K. Bribery Act allows English courts to assume exceptionally broad extraterritorial jurisdiction over non-U.K. corporations, not domiciled in the U.K., for bribery against foreign nationals, including *foreign public officials*, on foreign territory, on the basis that they simply "carry on a business or part of a business in the UK." Bribery Act, 2010, c. 23, §§ 6, 7(5)(b). The U.K. clearly does not hold, for itself, that such broad extraterritorial jurisdiction constitutes

"unreasonable interference with the sovereign authority of other nations." [35] It is therefore surprising that the U.K. should intimate that U.S. courts' assumption of jurisdiction in cases such as *Kiobel*, where a significantly greater nexus exists between the defendants and the U.S., is in some way contrary to the "jurisdictional limits imposed by international law."[36]

CONCLUSION

For the foregoing reasons, this Court should *reject* the premise that international law, and English law in particular, counsel against extraterritorial application of the Alien Tort Statute.

Respectfully submitted,

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[35] *See* U.K. and Netherlands Brief, at 30, *Kiobel*, No. 10-1491.

[36] *Id.*